

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of the Satellite Home)
 Viewer Improvement Act of 1999)
)
 Retransmission Consent Issues)

CS Docket No. 99-363

**COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION
 ON SECTION IV OF NOTICE OF PROPOSED RULEMAKING**

The National Cable Television Association ("NCTA") hereby submits its comments on Section IV of the Notice of Proposed Rulemaking in the above-captioned proceeding.

INTRODUCTION

The Satellite Home Viewer Improvement Act of 1999 ("SHVIA") enables satellite carriers to retransmit local broadcast programming to their subscribers pursuant to a new compulsory licensing provision of the Copyright Act. While the compulsory license obviates the need of satellite carriers to obtain permission from the copyright owners of all the programs carried by the local broadcast stations that they choose to retransmit, SHVIA requires satellite carriers to obtain retransmission consent from each such broadcast station – just as cable operators have been required to do since 1992. Beginning in 2002, satellite carriers will also be subject to a must-carry obligation that (like the obligations that already apply to cable operators) will require them to carry all local broadcast stations that opt for mandatory carriage in lieu of negotiating retransmission consent.

Congress, however, modified the retransmission consent provision of the Act with respect to cable operators *and* satellite carriers by imposing a new limitation that prevents broadcasters from excessively exploiting the benefits that accrue from their must

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carry/retransmission consent privileges and their free use of scarce spectrum. Specifically, Congress not only prohibited broadcasters from engaging in exclusive retransmission consent agreements but also imposed on broadcasters a duty to negotiate in good faith over retransmission consent with cable operators and satellite carriers.¹ Section IV of the Notice of Proposed Rulemaking is aimed at implementing these directives.

I. THE EXCLUSIVITY AND GOOD FAITH PROVISIONS APPLY TO RETRANSMISSION CONSENT AGREEMENTS AND NEGOTIATIONS WITH CABLE OPERATORS AND SATELLITE CARRIERS.

As a threshold matter, the Commission has noted that “although the statute is entitled the ‘*Satellite*’ Home Viewer Improvement Act, some of the amendments Congress enacted to Section 325 appear to have general impact upon the retransmission consent provisions as applied to all MVPDs” and has “tentatively conclude[d] that such was Congress’ intent.”² The retransmission consent provisions of SHVIA – and, in particular, the exclusivity and good faith provisions – are, by their terms, plainly applicable to retransmission consent agreements with *all* MVPDs.

Specifically, SHVIA amends paragraph (3) of subsection (b) of Section 325 by requiring the Commission to “*revise* the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent *under this subsection*” to incorporate, among other things, the exclusivity prohibition and the duty to negotiate in good faith.³ Subsection (b) sets forth the broadcasters’ retransmission consent rights with respect to all MVPDs, including cable operators and satellite carriers. The language of the provision speaks for itself.

¹ 47 U.S.C. § 325(b)(3)(C)(ii).

² Notice, ¶ 11 (emphasis in original).

³ 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

Congress crafted SHVIA to foster fair marketplace competition between cable operators and satellite carriers. The legislation gives satellite carriers the right to compete with cable operators in the retransmission of local broadcast signals, while subjecting both to the same retransmission consent requirements and – after a phase-in period – subjecting both to must-carry obligations. The regulations that the Commission adopts to implement the exclusivity and good faith provisions should – indeed, must – apply to broadcasters’ retransmission consent agreements and negotiations with cable operators, satellite carriers, and all other MVPDs.

II. BROADCASTERS MAY NOT REFUSE TO DEAL, AND THEY MAY NOT INSIST ON TERMS THAT ARE UNREASONABLE OR ARE TANTAMOUNT TO A REFUSAL TO DEAL.

Broadcasters have had the benefit of a must-carry/retransmission consent election with respect to carriage on cable television systems since 1992. This “heads-I-win, tails-you-lose” regime obviously distorts the competitive marketplace. First, it gives broadcasters an artificial competitive edge vis-à-vis cable programming services by providing a virtual guarantee of carriage. Second, while broadcasters are able to negotiate for compensation in return for carriage in those instances where they believe that carriage is worth more to the cable operator than to the broadcaster, cable operators are effectively prevented from obtaining any compensation when carriage is worth more to the broadcaster than to the operator.

In granting broadcasters a right of retransmission consent in 1992 with respect to MVPD carriage, Congress made it possible for broadcasters to negotiate some form of compensation for the retransmission of their programming. But Congress obviously did not expect or intend that broadcasters would refuse to deal with an MVPD or that they would insist on unreasonable terms that were, in effect, deal-breakers. The Commission understood this when, in adopting rules to implement the retransmission consent provisions of the 1992 Act, it barred broadcasters from

granting *exclusive* retransmission consent to an MVPD. And Congress confirmed that the Commission was right when, in SHVIA, it codified a ban on exclusivity until 2006.

In the same sentence, Congress also directed the Commission to prohibit broadcasters from “failing to negotiate in good faith.” In large part, this prohibition is simply a corollary to the principal rule barring exclusivity. It confirms that broadcasters are prohibited not only from entering into exclusive *agreements* with MVPDs but also from *unilaterally* refusing to deal with an MVPD.⁴

The “good faith” requirement, in this context, means that broadcasters may not engage in negotiating tactics or insist, on a take-it-or-leave-it basis, on terms that are unreasonable or tantamount to a refusal to negotiate. Moreover, they obviously may not engage in dilatory or dishonest negotiating tactics that are meant to give only the appearance of bona fide negotiations. In particular, where a cable operator or other MVPD shows a willingness to negotiate for continued carriage of a local broadcast station, the station should have an affirmative duty to negotiate terms for such carriage and should not be permitted to withhold retransmission consent during the pendency of such negotiations.

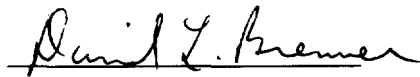
It may also be possible for the Commission to identify certain terms and conditions that are presumptively or *per se* impermissible under these standards. And there may be specific negotiating tactics that can be identified and proscribed in advance as evidence of bad faith. But the Commission will also necessarily have to consider, on a case-by-case basis, complaints of other practices that allegedly constitute refusals to negotiate in good faith.

⁴ See Conference Report at 13: “The regulations would, until January 1, 2006, prohibit a television broadcast station from . . . *refusing to negotiate in good faith* regarding retransmission consent agreements.” (Emphasis added.)

CONCLUSION

The Act permits broadcasters to bargain for some form of fair compensation in return for retransmission consent. But it also *requires* them to bargain with cable operators and other MVPDs on terms that are aimed at making, not breaking, a deal. The Commission's rules should prohibit broadcasters from insisting on terms and conditions, and from engaging in negotiating tactics, that are so unreasonable as to be tantamount to a refusal to negotiate.

Respectfully submitted,



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